Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-1074

Appeal M-9700247

The Corporation of the City of Kingston

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NATURE OF THE APPEAL:

The Corporation of the City of Kingston (the City) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for the names and job titles of all municipal employees who accepted buyouts in the Voluntary Exit Program (the VEP) sponsored by the Transition Board of the new City of Kingston.

The City identified a four-page record which consists of the names and job titles of the City employees who accepted buyouts in the VEP. The City denied access to the record on the basis of the following exemption:

- invasion of privacy - section 14(1)

The appellant appealed this decision, and also claimed that the matter is of a compelling public interest and that the record should be disclosed pursuant to section 16 of the Act.

This office sent a Notice of Inquiry to the appellant and the City. Because the Appeals Officer assigned to the file identified the possibility that the record might fall within the scope of section 52(3) of the Act, this issue was included in the Notice. If section 52(3) applies, and none of the exceptions listed in section 54(4) are present, then the records are excluded from the scope of the Act and are not subject to the Commissioner's jurisdiction.

Representations were received from both parties.

DISCUSSION:

JURISDICTION

The interpretation of sections 52(3) and (4) is a preliminary issue which goes to the jurisdiction of the Commissioner or her delegates to continue an inquiry. If the requested records fall within the scope of section 52(3) of the Act, they would be excluded from the scope of the Act unless they are records described in section 52(4). Section 52(4) lists exceptions to the exclusions established in section 52(3).

Sections 52(3) and (4) of the Act read as follows:

> (3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3 Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

(4) This Act applies to the following records:

1. An agreement between an institution and a trade union.

2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Sections 52(3) and (4) are record-specific and fact-specific. If a record which would otherwise qualify under any of the listed paragraphs of section 52(3) falls within one of the exceptions enumerated in section 52(4), then the record remains within the Commissioner's jurisdiction and the access rights and procedures contained in Part 1 of the Act apply.

Sections 52(3)1 and 2

The City submits that although the information was collected, prepared, maintained and used by the City, this was not in relation to proceedings or anticipated proceedings before a court or tribunal, nor were there any negotiations around the subject of the VEP. Therefore, the City submits that sections 52(3)1 and 2 does not apply.

I agree that these sections are not applicable.

Section 52(3)3

In order to fall within the scope of paragraph 3 of section 52(3) of the Act, the City must establish that:

1. the record was collected, prepared, maintained or used by the City or on its behalf; **and**

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communication; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the City has an interest.

[Order P-1242]

Requirements 1 and 2

The City states that the information contained in the record was collected, prepared, maintained and used by the City and, that it was in relation to consultations and communications about employment-related matters.

Having reviewed the record, I find that it was clearly prepared and maintained by the City. I am also satisfied that the preparation and maintenance of the record was in relation to discussions and communications regarding the VEP. Therefore, Requirements 1 and 2 have been established.

Requirement 3

In my view, the VEP is an employment-related matter. The only remaining issue is whether this matter can be characterized as one "in which the institution has an interest".

In Order P-1242, I considered the meaning of this phrase in section 65(6)3, the provincial equivalent of section 52(3)3. I stated:

> [A]n "interest" must be a legal interest in the sense that the matter in which the Ministry has an interest must have the capacity to affect the Ministry's legal rights or obligations.

The City submits that the interest is "both in respect of the effect of the Voluntary Exit Program on the Collective Agreement between the City and its unionized employees, and with respect to obligations towards employees with respect to retirement, severance, vacation pay, et cetera."

While I accept that the City certainly has an interest in the proper administration of the VEP, I do not accept that this is sufficient to constitute a "legal interest". The VEP was made available to employees

who may wish to **voluntarily** leave their employment in return for a buyout package. Therefore, in my view, this does not have the capacity to affect the City's legal rights or obligations in the requisite sense, since any decision to enter the program is strictly up to the individual employees.

Accordingly, I find that the record does not fall within the parameters of section 52(3) and is, therefore, subject to the Act.

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, personal information is defined, in part, to mean recorded information about an identifiable individual. The record contains the names and positions of certain employees, together with the fact that they have opted to participate in the VEP. In my view, this constitutes the personal information of all listed employees. The record clearly does not contain any of the appellant's personal information.

Once it has been determined that a record contains personal information, section 14(1) of the Act prohibits the disclosure of personal information to any person other than the individual to whom the information relates, except in certain circumstances listed under the section. In my view, the only exception to the section 14(1) mandatory exemption which has potential application in the circumstances of this appeal is section 14(1)(f), which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 14(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 14(2) provides some criteria for the head to consider in making this determination. Section 14(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The only way in which a section 14(3) presumption can be overcome is if the personal information at issue falls under section 14(4) of the Act, or where a finding is made under section 16 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 14 exemption. As I stated earlier in this order, the appellant has raised the possible application of section 16.

The City submits that the information in the record relates to employment history and describes the individuals' finances, income, assets or financial activities, and therefore the presumptions found under sections 14(3)(d) and (f) apply.

I disagree. The record only lists individual names and current job titles and, therefore, contains no information about employment **history**. It contains no financial information whatsoever. Accordingly, I find that neither of the presumptions in sections 14(3)(d) and (f) apply.

The appellant states that disclosure of the record would subject the activities of the City to "public scrutiny and accountability" (section 14(2)(a)), and that disclosure would not be an unjustified invasion of personal privacy. However, all of his supporting arguments focus on whether there is a compelling public interest in disclosure. In my view, there are two elements that must be met for section 14(2)(a) to be a relevant factor: (1) the activities of the City must have been publicly called into question; and (2) the disclosure of the personal information of the affected persons is desirable in order to subject the activities of the City to public scrutiny. Evidence to establish both of these elements must be provided by the appellant.

The appellant himself has publicly called the activities of the City into question through his newspaper articles on the VEP. As a reporter, I accept that the appellant has a recognized role as a voice for public concern. However, I feel it is important to note that I have been provided with no evidence to indicate community concerns expressed by other media spokespersons or members of the community. In addition, even if I were to accept that the appellant has established the first element of section 14(2)(a), in my view, the appellant has not convinced me that disclosure of the names and position titles of specific individuals electing to take the VEP is desirable in order to satisfy and public scrutiny requirements. Therefore, I find that section 14(2)(a) is not a relevant consideration in the circumstances of this appeal.

Having found that the record contains information which qualifies as personal information, and in the absence of relevant evidence from the appellant weighing in favour of a finding that disclosure of the personal information would **not** constitute an unjustified invasion of personal privacy, I find that the exception contained in section 14(1)(f) does not apply in the circumstances of this appeal. Accordingly, the record is properly exempt from disclosure under the mandatory requirements of section 14 of the Act.

COMPELLING PUBLIC INTEREST

The appellant relies on section 16 of the Act, arguing that there is a compelling public interest in disclosure of the personal information contained in the record.

Section 16 of the Act reads as follows:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

In order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the personal information exemption.

It is important to note that section 14 is a mandatory exemption whose fundamental purpose is to ensure that the personal privacy of individuals is maintained except where infringements on this interest are justified. In my view, where the issue of public interest is raised, one must necessarily weigh the costs and benefits of disclosure to the public. As part of this balancing, I must determine whether a compelling public interest exists which outweighs the purpose of the exemption.

The appellant submits that it is exceedingly difficult to independently assess the mass buyout program if it is not known who is leaving. He suggests that disclosure of this information may answer questions such as "Have City taxpayers lost a whole group of workers with specific skills?" and "Have [the taxpayers] lost valued municipal employees with prominent public profiles?". The appellant also provided some of his newspaper articles dealing with the impact of employees leaving the City.

Having reviewed the record and the representations, I am not convinced that disclosure of the names of the individuals who have decided to participate in the VEP, which I have found to constitute an unjustified invasion of privacy under the Act, is necessary in order to advance the public interest in assessing the impact of this program.

In my view, the newspaper articles reflect, to a certain degree, a public interest in the amalgamation of the City with other surrounding municipalities and the impact it is having on employment. However, the appellant has failed to satisfy me that there is a compelling public interest in the disclosure of the particular personal information which is at issue in this appeal. Moreover, even if the public interest in disclosure were compelling, in my view, the appellant has not established that this interest is sufficient to outweigh the purpose of the mandatory section 14(1) exemption, the protection of individual privacy, which is one of the central purposes of the Act.

Accordingly, I find that section 16 does not apply in the circumstances of this appeal. The personal information contained in the record is, accordingly, properly exempt under section 14(1).

ORDER:

I uphold the decision of the City.

Original signed by: February 6, 1998
Tom Mitchinson
Assistant Commissioner